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Public Prosecutor v Badrul Hisham bin Shaharin

B HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42LB-58–10 OF 2016
SM KOMATHY JC
11 JANUARY 2018

C *Criminal Law — Peaceful assembly — Notification of assembly — Whether respondent an organiser of assembly — Definition of 'organiser' pursuant to s 3 of the Peaceful Assembly Act 2012 — Presumption in s 19 of the Peaceful Assembly Act 2012 — Peaceful Assembly Act 2012 ss 3, 9(1) & 19*

D Badrul Hisham bin Shaharin ('Badrul') was charged under s 9(1) of the Peaceful Assembly Act 2009 ('the Act') for organising an illegal assembly on 25 May 2013. He was tried at the sessions court and was acquitted because the public prosecutor failed to prove that he was the organiser of the said illegal assembly as the investigating officer's testimony was contradicted by the E testimony of three of the public prosecutor's witnesses. The public prosecutor then appealed against the acquittal of Badrul to the High Court of Malaya. The public prosecutor submitted that the learned sessions court judge was misdirected in law as it was incumbent on the sessions court judge to consider whether the acts of Badrul came within the statutory definition in s 3 or the F presumption in s 19 of the Act instead of relying on the three witnesses' views that he was not the organiser.

Held, dismissing the appeal:

G (1) The learned deputy prosecutor's reliance on the presumption contained in s 19 of the Act was misconceived in view of the unchallenged testimony of the three witnesses which established that the organiser of the event was Secretariat Pakatan Rakyat (see para 10).

H (2) In view of the opening words of s 3 of the Act namely 'unless the context otherwise requires', the definition of the term organiser was not to be regarded as sacrosanct and, could be departed from if the circumstances of the case showed that the strictures of the statutory definition could not be rigorously applied. In this case, the notes of evidence indicated that the three witnesses were not asked any questions during re-examination to I clarify if they had any personal knowledge for saying that the organiser of the event was Secretariat Pakatan Rakyat. In the circumstance, it would be reasonable to assume that the testimony of the witnesses must be based on the documents these witnesses had seen or heard or from discussions held between the organiser and the police. The court disagreed with the

learned deputy that the sessions judge was wrong in ignoring the statutory meaning given to the word 'organiser' (see para 9).

[**Bahasa Malaysia summary**

Badrul Hisham bin Shaharin ('Badrul') didakwa di bawah s 9 (1) Akta Perhimpunan Aman 2009 ('Akta') kerana telah menganjur perhimpunan haram pada 25 Mei 2013. Dia telah diadili di mahkamah sesyen dan dibebaskan kerana pendakwa raya gagal untuk membuktikan bahawa dia adalah penganjur perhimpunan haram itu atas sebab keterangan pegawai penyiasat bertentangan dengan keterangan tiga saksi pendakwa raya. Pendakwa raya kemudian merayu terhadap pembebasan Badrul ke Mahkamah Tinggi Malaya. Pendakwa raya berhujah bahawa bahawa hakim mahkamah sesyen terkhilaf dari segi undang-undang kerana hakim mahkamah sesyen patut mempertimbangkan sama ada perbuatan Badrul dirangkumi dalam definisi berkanun s 3 atau anggapan dalam s 19 Akta dan bukan bergantung pada pandangan ketiga-tiga saksi bahawa dia bukan penganjur.

Diputuskan, menolak rayuan:

(1) Pergantungan timbalan pendakwa terhadap anggapan yang terkandung dalam s 19 Akta adalah silap memandangkan keterangan ketiga-tiga saksi tidak dicabar yang menyatakan bahawa penganjur acara itu adalah Secretariat Pakatan Rakyat (lihat perenggan 10).

(2) Mengikut kata-kata pembukaan s 3 Akta iaitu 'unless the context otherwise requires', takrif istilah penganjur itu tidak boleh dianggap sebagai sakral dan boleh diketepikan jika hal keadaan menunjukkan bahawa ketetapan takrif berkanun tidak boleh diterapkan dengan ketat. Dalam kes ini, nota keterangan menunjukkan bahawa ketiga-tiga saksi itu tidak ditanya sebarang soalan semasa pemeriksaan semula untuk memperjelas jika mereka mempunyai pengetahuan peribadi untuk menyatakan bahawa penganjur acara itu adalah Secretariat Pakatan Rakyat. Dalam keadaan ini, adalah munasabah untuk mengandaikan bahawa keterangan saksi mestilah berasaskan kepada dokumen-dokumen yang dilihat atau didengar oleh saksi-saksi atau daripada perbincangan yang diadakan antara penganjur dan polis. Mahkamah tidak bersetuju dengan timbalan pendakwaraya yang terpelajar bahawa hakim sesyen salah dalam mengabaikan makna berkanun yang diberikan kepada perkataan 'penganjur' (lihat perenggan 9).]

Notes

For a case on notification of assembly, see 4(2) *Mallal's Digest* (5th Ed, 2015) para 2002.

Legislation referred to

Peaceful Assembly Act 2009 ss 3, 9, 9(1), 19

Farah Wahida bt Md Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Gobind Singh Deo (Mohd Haijan Omar with him) (Gobind Singh Deo & Co) for the respondent.

SM Komathy JC:

[1] This is an appeal by the public prosecutor against the decision of the learned sessions judge to acquit the respondent, Badrul Hisham bin Shaharin, of a charge under s 9(1) of the Peaceful Assembly Act 2009 ('the Act').

[2] For completeness, I set out the charge against the respondent:

> Bahawa kamu pada 25/5/2013, jam lebih kurang 5.00 petang bertempat di Dataran Petaling Jaya, Padang Timur, Jalan Timur, Petaling Jaya, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan telah didapati sebagai penganjur Perhimpunan Program Penghargaan Kepada Pengundi Negeri Selangor telah gagal memberitahu Pegawai Yang Menjaga Daerah Polis Petaling Jaya mengenai dimana perhimpunan tersebut hendak diadakan dalam tempoh masa yang ditetapkan iaitu (10) hari sebelum tarikh perhimpunan itu diadakan. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 9(1) Akta Perhimpunan Aman 2012 dan boleh dihukum di bawah seksyen 992 Akta yang sama.

[3] Section 9 of the Act reads:

> (1) An organizer shall, ten days before the date of an assembly, notify the Officer in Charge of the Police District in which the assembly is to be held.
>
> (2) Subsection (1) shall not apply to —
>
> (a) an assembly which is to be held at a designated place of assembly; and
>
> (b) any other assemblies as may be specified in the Third Schedule.
>
> (3) ...
>
> (4) the notification under subsection (1) shall be given to the Officer in Charge of the Police District in which the assembly is to be held by AR registered post or courier or by hand.
>
> (5) A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

THE PROSECUTION EVIDENCE

[4] The salient facts relating to the charge as found by the sessions judge were as follows:

(1) Menurut keterangan saksi pendakwaan, pada 25.5.2013 satu perhimpunan telah diadakan di Padang Timur, Petaling Jaya. Menurut SP1 yang bertugas sebagai Jurugambar di tempat tersebut, beliau mendapati pada tarikh tersebut, mulai jam 4.30 petang beliau melihat ramai orang berhimpun di tempat tersebut dan kebanyakan mereka memakai pakaian berwarna hitam. Beliau juga apabila ditanyakan apakah perbincangan di dalam perhimpunan tersebut menyatakan bahawa perhimpunan tersebut adalah Program Penghargaan kepada pengundi Selangor.

(2) SP6, Dato' Johari bin Abdul telah memberi keterangan bahawa beliau telah membuat permohonan untuk menggunakan padang tersebut. Permohonan (ex P6) tersebut bertarikh 21.5.2013 dialamatkan kepada En Aznan bin Hj Hassan, Pengarah Jabatan Pembangunan Kemasyarakatan MBPJ. Menurut beliau, permohonan dibuat oleh beliau dalam kapasiti beliau sebagai Pengerusi Program yang bertujuan untuk mengucapkan terima kasih kepada pengundi Selangor yang mengundi Pakatan Rakyat pada pilihanraya ke-13.

(3) Pada tarikh yang sama dengan perhimpunan, jam lebih 3.40 pm, semasa SP8 bertugas di bilik Gerakan IPD Petaling Jaya, beliau telah didatangi oleh dua orang lelaki yang menghantar sepucuk surat permohonan untuk mendapatkan lesen perhimpunan. Surat tersebut yang kini ditandakan ekshibit P8. Surat P8 tersebut ditandatangani oleh penama yang tertulis Che Gu Bard. Memandangkan permohonan tersebut dihantar pada hari yang sama dengan perhimpunan diadakan, ianya tidak mematuhi syarat yang ditetapkan oleh seksyen 9(1) Akta Perhimpunan Aman, 2012. Oleh yang demikian, Orang Kena Saman (OKS) yang juga dikenali sebagai Che Gu Bard telah dipertuduhkan di Mahkamah di bawah kesalahan ini.

[5] In her grounds of judgment, the learned sessions judge identified the three ingredients the prosecution had to prove as:

Bagi membuktikan kes, pihak pendakwaan hendaklah memenuhi elemen berikut:

(1) OKS adalah penganjur;

(2) dalam tempoh 10 hari sebelum tarikh perhimpunan; dan

(3) memaklumkan memberi notis secara pos berdaftar akuan terima atau kiriman cepat atau dengan serahan tangan kepada Pegawai yang menjaga Daerah Polis dimana perhimpunan tersebut diadakan.

[6] At the end of the prosecution's case, the learned sessions judge found that prosecution had proved ingredients (2) and (3), but had failed to prove

that the respondent was the organiser of the event and acquitted him. She found that the evidence of the investigating officer ('PW9') that the respondent was the organiser of the event was contradicted by the testimony of three of the prosecution witnesses, namely, PW5, PW6 and PW8. Inspector Rajakumar (PW5) who videotaped the event, and Inspector Muhamad Daud bin Ismail ('PW8'), the officer who received exh P8 had both, under cross-examination, testified that the organiser of the event was 'Secretariat Pakatan Rakyat'. This was confirmed by Dato Johari bin Abdul ('PW6'), who testified that:

> Saya membuat permohonan ini di dalam kapasiti saya sebagai Pengerusi Program. Kita tubuhkan jawatankuasa untuk mengucapkan terima kasih kepada pengundi-pengundi Negeri Selangor yang mengundi Pakatan rakyat di dalam pilihanraya yang ke-13. Sekretariat tersebut seperti yang dinyatakan di dalam kepala surat iaitu No 17, Jalan 16/2, Seksyen 16, Petaling Jaya, Selangor. Selepas saya membuat permohonan tersebut, Pengarah menandatangani satu surat dan meluluskan permohonansaya dengan mengenakan bayaran-bayaran tertentu yang mana telah pun kami buat.

[7] Before me the acquittal was attacked by the learned deputy public prosecutor on the sole ground that the sessions judge erred in holding that the prosecution had failed to prove that the respondent was the organiser of the assembly. It was submitted that as the term organiser was statutorily defined in s 3 of the Act, it was incumbent on the sessions judge when determining who the organiser of the event was to merely consider whether the acts of the respondent came within the statutory definition in s 3, or the presumption in s 19. The learned deputy contended that the sessions judge misdirected herself in relying on the views expressed by the prosecution witnesses PW5, PW6 and PW8 that 'Secretariat Pakatan Rakyat' was the organiser of the event contrary to s 3 of the Act, and the presumption in s 19 of the Act.

[8] To better understand the deputy's contention, I reproduce ss 3 and 19 of the Act:

> Section 3:
>
> In this Act, unless the context otherwise requires —
>
> 'Organiser'
>
> means a person who is responsible for the organization of an assembly, including the arranging, convening, collecting or forming of the assembly, or who is responsible for the conduct of an assembly;
>
> Section 19
>
> Presumption as to organizer
>
> If:
>
> (a) an assembly is held at a designated place of assembly;
>
> (b) an assembly is specified in the Third Schedule;

(c) a notification required under subsection 9(1) was not given; or

(d) a notification required under subsection 9(1) was given but the identity of the organizer stated in the notification is false,

any person who initiates, leads, promotes, sponsors, holds or supervises the assembly, or invites or recruits participants or speakers for the assembly, shall be deemed to be the organizer of the assembly.

[9] In view of the opening words of s 3 namely 'unless the context otherwise requires', the definition of the term organiser is not to be regarded as sacrosanct and, can be departed from if the circumstances of the case show that the strictures of the statutory definition cannot be rigorously applied. Reverting to the facts here, the notes of evidence indicate that PW5, PW6 and PW8 were not asked any questions during re-examination to clarify if they had any personal knowledge for saying that the organiser of the event was Secretariat Pakatan Rakyat. In the circumstance, it would be reasonable to assume that the testimony of the witnesses must be based on the documents these witnesses had seen or heard or from discussions held between the organiser and the police. I am thus unable to agree with the learned deputy that the sessions judge was wrong in ignoring the statutory meaning given to the word organiser.

[10] In my view, the learned deputy's reliance on the presumption contained in s 19 is also misconceived in view of the unchallenged testimony of PW5, PW6 and PW8 which established that the organiser of the event was Secretariat Pakatan Rakyat.

[11] For the aforesaid reason, I find that the learned sessions judge was entirely correct and that the appeal should be dismissed.

Appeal dismissed.

Reported by Lee TJ